UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

MICHAEL J. FLYNN, *et al.*,

Plaintiffs,

v.

MICHAEL LOVE, *et al.*,

Defendants.

Case No. 3:19-cv-00239-MMD-CLB

ORDER

I. SUMMARY

Plaintiffs Michael Flynn and Philip Stillman[1] bring this action against Defendants Michael and Jacquelyne Love, Meleco, Inc., and Trustee Michael Love of the Michael Love Family Trust pertaining to a settlement involving the copyrights of 35 songs and events surrounding these songs. (ECF No. 121.) Discovery between the parties has been contentious, and this is the second time the Court is addressing objections involving discovery issues previously decided by United States Magistrate Judge Carla L. Baldwin (ECF Nos. 190, 191, 192, 246, 311). Before the Court are two objections[2]—one by Plaintiffs (ECF No. 316) and the other by Intervenor Plaintiff Successor Trustee Rebecca Flynn-Williams of the Laima Flynn Trust ("Trust") (ECF No. 313)—to Judge Baldwin's order granting Defendants' motions to compel and for sanctions (ECF No.

[1]Plaintiffs are attorneys licensed in Massachusetts. (ECF No. 121 at 2.) Plaintiffs are representing themselves *pro se* in this action.

[2]The Court denies Plaintiff Flynn's request to join "the objections of Attorney Stillman [and] the Laima Flynn Trust" (ECF No. 315 at 1). Joinder is inappropriate here because Flynn both raises new arguments and repeats arguments made in Plaintiffs' objection, which Flynn has also signed. (ECF No. 316 at 25.) Denying Flynn's request may help clarify the murky relationship between the *pro se* plaintiffs and is in line with prior admonishments that "*pro se* plaintiffs may only represent themselves." (ECF No. 331 at 6-8.)

311 ("Order")). Defendants responded to both objections. (ECF Nos. 325, 326.[3]) For the reasons discussed below, the Court finds that Judge Baldwin did not clearly err and therefore overrules both objections.

II. BACKGROUND[4]

On February 1, 2023, Judge Baldwin issued the Order granting Defendants' motions to compel (ECF Nos. 276, 296 (renewed)) and motions for sanctions (ECF Nos. 278, 297 (renewed)), after again finding that Plaintiffs failed to establish that "any privilege or protections" apply to protect the nearly 2,300 communications indexed in their revised privilege log.[5] (ECF No. 311 at 5-6.) Consequently, Plaintiffs were ordered to "produce all documents and communications set forth in their original and revised logs" no later than 30 days from the entry of the Order, and Defendants were awarded reasonably attorneys' fees and costs incurred in filing their renewed motions. (*Id.* at 7-8.) Plaintiffs—together in one filing—timely objected to the Order (ECF No. 316). The Trust, which "has not been part of these discovery disputes," also objected to the Order, contending in part that it needed "clarity to avoid further disputes." (ECF No. 313 at 10.)

III. LEGAL STANDARD

Magistrate judges are authorized to resolve pretrial matters subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a) (a "district judge . . . must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law"); *see also* LR IB 3-1(a) ("A district judge may reconsider any pretrial matter referred

---

[3]ECF No. 325 (response to Plaintiff Flynn's joinder) and ECF No. 326 (response to both objections) appear identical. For purposes of this order, the Court will only cite to ECF No. 325 when referencing Defendants' arguments.

[4]The Court incorporates by reference the additional background facts discussed in the Order. (ECF No. 311 at 1-4.)

[5]Only Stillman provided a supplemental (revised) privileged log. (ECF No. 276-4.) Flynn did not provide a revised privilege log; instead, he stated that Stillman "is effectively acting as [Flynn's] counsel," and that he would "join in [Stillman's] privilege log," despite the Court's order directing Flynn to file discovery responses on his own behalf as a *pro se* litigant. (ECF Nos. 296-3 at 2, 151 at 12.)

to a magistrate judge in a civil or criminal case under LR IB 1-3, when it has been shown the magistrate judge's order is clearly erroneous or contrary to law."). A magistrate judge's order is "clearly erroneous" if the court has a "definite and firm conviction that a mistake has been committed." *See U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Jadwin v. Cnty. of Kern*, 767 F. Supp. 2d 1069, 1110-11 (E.D. Cal. 2011) (quoting *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y. 2006)). A magistrate judge's pretrial order issued under § 636(b)(1)(A) is not subject to *de novo* review, and the reviewing court "may not simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of S.F.*, 951 F.2d 236, 241 (9th Cir. 1991).

IV. DISCUSSION

A. The Trust's Standing to Challenge the Order as Intervenor Plaintiff

To start, the Court agrees with Defendants that the Trust—an intervenor plaintiff who conceded it "has not been part of these discovery disputes" between Plaintiffs and Defendants—lacks standing to challenge the Order. (ECF No. 313 at 10.) *See also Diamantis v. Milton Bradley Co.*, 772 F.2d 3, 4 (1st Cir. 1985) (recognizing the "well settled" principle "under the standing doctrine that a party ordinarily may not assert the legal rights of others") (citing *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). While it understandably wants to expedite the litigation, the Trust "has not shown that [its] own rights are threatened" by Plaintiffs' compliance with the Order. *Id.*

Even if the Trust had standing, Defendants correctly argue that the Trust's request that the Court "address all of the components of the work product doctrine" and "clarify the applicability of the common interest privilege" amount to an improper advisory opinion. (ECF Nos. 313 at 10, 325 at 9.) Because there is no pending discovery dispute between the Trust and Defendants, addressing whether the work product doctrine and attorney-client privilege apply to the Trust's communications with Plaintiffs would result in "an opinion advising what the law would be upon a hypothetical

state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *see also In re MacNeil*, 907 F.2d 903, 904 (9th Cir. 1990). Moreover, both the Trust and Defendants attest to already having met and conferred about potential deficiencies in the Trust's privilege logs. (ECF Nos. 313 at 3, 325 at 9.) If a similar discovery dispute emerges between these parties, the Court can later determine whether the Trust's communications are privileged or protected work product after full briefing.[6]

For these reasons, the Court overrules the Trust's objection.

B. Attorney-Client Privilege

Next, the Court finds Judge Baldwin did not clearly err in finding that "Plaintiffs have again not met their burden of establishing the applicability of any privilege or protections." (ECF No. 311 at 6.) As Judge Baldwin did, the Court has reviewed the revised privilege log and in fact agrees with Judge Baldwin that Plaintiffs have again failed to establish that the attorney-client privilege applies. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992) ("The party asserting the attorney-client privilege has the burden of proving that the privilege applies to a given set of documents or communications."); *Millennium Holding Grp., Inc. v. Sutura, Inc.*, Case No. 2:05-cv-00356-JCM-LRL, 2007 WL 121567, at *2 (D. Nev. Jan. 11, 2007) ("A failure to comply with privilege log requirements will result in a finding that discovery opponents have failed to meet their burden of establishing the applicability of the privilege.") (citation omitted). In addition to discrepancies, significant portions of the indexed emails in the privilege log lack crucial information that enables the Court to decide whether attorney-client privilege applies.[7] (*See generally* ECF Nos. 276-4, 276-5, 276-6, 276-7,

[6]The Court directs the Trust to its previous orders outlining the legal standards to determine the applicability of the attorney-client privilege and work product doctrine as well as privilege log requirements. (ECF Nos. 192 at 4-8, 246 at 7-8 & n.9.) Judge Baldwin has also repeatedly addressed these issues with the parties, as she noted in the Order. (ECF No. 311 at 2-3.)

[7]Plaintiffs' argument that Judge Baldwin clearly erred because she "failed to acknowledge that even one email was privileged" loses the forest for the trees. (ECF No. 316 at 15-16.) Even if the revised privilege log sufficiently described at least one communication for privilege purposes, that does not account for the approximately

276-8, 276-9, 311 at 5-6.) Thus, Judge Baldwin did not clearly err in finding that Plaintiffs have not met their burden to show that the materials withheld are privileged.

C. Work Product Doctrine

As this Court has previously concluded (*see* ECF Nos. 192, 246), the work product doctrine does not shield Plaintiffs from producing the requested documents because descriptions in the revised privilege log still do not enable the Court to conclude that these documents were prepared in anticipation of litigation. (*See* ECF No. 276-4.) *See also* Fed. R. Civ. P. 26(b)(5)(A); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Nev. Power. Co. v. Monsanto Co.*, 151 F.R.D. 118, 121 (D. Nev. 1993). Bolstering this conclusion is Plaintiff Flynn's decision to not provide the Court his own revised privilege log; instead, he stated he would "join in [Stillman's] privilege log," despite the Court's order directing Flynn to file discovery responses on his own behalf. (ECF Nos. 296-3 at 2, 151 at 12.)

Additionally, as Judge Baldwin noted and despite Plaintiffs' contention, the nature of Plaintiffs' allegations in the operative complaint put their state of mind at issue. (*See* ECF No. 121.) Because Plaintiffs' mental impressions are in play, their opinion work product—for which Plaintiffs have demonstrated a compelling need—is thus likely disclosable. *See Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992).

Accordingly, Judge Baldwin did not clearly err in finding that Plaintiffs have not met their burden of demonstrating that the work product doctrine shields them from producing the requested documents and communications. *See LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 598 (D. Nev. 2012); *Cung Le v. Zuffa, LLC*, 321 F.R.D. 636, 640 (D. Nev. 2017).

///

2,300 remaining emails. Plaintiffs should not burden the Court with the onerous task of deciphering vague descriptions and, in turn, speculating as to whether each email may or may not be privileged or protected as work product.

D. Judge Baldwin's Ruling on Defendants' Motions for Sanctions

Lastly, the Court finds that Judge Baldwin did not clearly err in granting Defendants' motions for sanctions. Plaintiffs argue that the Order is contrary to law because "there is no showing by Defendants that they even made a nominal effort to [meet and] confer" before seeking judicial intervention. (ECF No. 316 at 23-24.) The Court disagrees and notes that Plaintiffs raise this argument out of context. Defendants indeed attempted to obtain discovery without court intervention. And as Defendants show, Judge Baldwin eventually "dispense[d] with" the parties' meet-and-confer requirements because the meet-and-confers up to that point were "not productive" and had "increas[ed] the amount of litigation and the amount of the costs to the parties." (ECF No. 151 at 49-50.) Moreover, both the facts and the law disprove Plaintiffs' assertion that they were "substantially justified" in withholding the requested documents, repeatedly failing to meet their evidentiary burdens, and unnecessarily drawing out this litigation. *See Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005). Because (1) the Court has broad discretion regarding the type and degree of discovery sanctions it deems "just," (2) the circumstances do not show that Judge Baldwin's award of reasonable attorneys' fees and costs would be unjust, and (3) none of the exceptions under Rule 37(a)(5)(A) applies here, Judge Baldwin did not clearly err when she granted Defendants' motions for sanctions. *See* Fed. R. Civ. P. 37(a)(5)(A); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707-08 (1982).

///

///

///

///

///

///

///

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of issues before the Court.

It is therefore ordered that Plaintiffs' objection (ECF No. 316) is overruled.

It is further ordered that Intervenor Plaintiff Successor Trustee Rebecca Flynn-Williams's objection (ECF No. 313) is overruled.

It is further ordered that Plaintiff Michael Flynn's request to join both objections (ECF No. 315) is denied.

DATED THIS 30th Day of March 2023.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE